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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MISSOURI COALITION FOR THE ENVIRONMENT, *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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The brief in opposition appears calculated to obfuscate the Questions Presented, rather than disclose "any matter or ground why the cause should not be reviewed by this Court." Rule 22 of the Rules of this Court. The effort commences at page (I), where respondents mis-state the Questions Presented. The Questions Presented are to be stated by the petitioners. Rule 21. Respondents have no authority to replace them with a question they prefer. Petitioners have presented two Questions, of general importance, independent of the detailed facts of the administra-

tive record: whether the court of appeals erred in (1) upholding an agency Finding of No Significant Impact unsupported by a reasoned explanation or evaluation of relevant factors, and (2) barring plaintiffs' challenge to a Finding of No Significant Impact because the plaintiffs failed (in the court's view) to prove facts "omitted from the administrative record." These are fundamental questions that go to the availability and procedure of judicial review, not to whether the Corps "acted arbitrarily or capriciously" on the basis of thousands of documents and 66 pounds.

The effort continues at page 7, where respondents incorrectly assert "petitioners do not dispute . . . that the Corps considered all of petitioners' complaints . . ." Of course, petitioners have disputed that from the beginning, and have pointed out that it is not necessary even to look at the thousands of documents collected by the Corps to determine whether specified environmental impacts were considered, because there are no findings of those impacts, and there is no reasoned explanation of any findings. See, *e.g.*, Petition p. 21. Indeed, the Corps' decisional document (MFR) explicitly recites that the Corps will not even attempt to quantify, much less evaluate, air pollution impacts, since "agencies with responsibility for and special expertise in air quality matters do not regulate indirect sources of air pollution . . ." Pet. App. 53a-54a. The Corps could not and did not consider the traffic hazards and obstruction in the nearby communities of Maryland Heights and Bridgeton, described as "disaster" by the only expert who expressed an opinion on the subject, because the Corps refused to require any quantification of those impacts. See Petition, p. 21. The Corps could not and did not consider the effect of surface water run-off into the wetlands, notwithstanding the concerns of the Fish and Wildlife Service, because the Corps did not know what, if anything, would be done to protect the wetlands. See Petition, p. 21. The Corps refused to consider the cumulative impact of this revised project and other existing and planned projects to complete St. Louis County's Plan to

develop the entire 22,000-acre Missouri Bottoms. See Petition, p. 21. However, these failures of the Corps are significant here because they illustrate the inadequacy of the standard of review utilized by the court of appeals. To misrepresent petitioners' position on these details, and attempt to provoke debate over what the Corps "considered," simply diverts attention from the question whether the court of appeals followed the proper standards and procedure for judicial review.[1]

At page 8 respondents argue that the Corps "carefully considered . . . consulted . . . was careful . . .", citing only irrelevant pages of the government brief below for authority for that "care." This effort to provoke debate over the details of the administrative record is irrelevant to the Questions Presented. The error of these statements would become apparent if we had a reasoned evaluation of the environmental impacts, and searched for evidence to support it, but we have none.

Respondents pursue their diversionary course by asserting (p. 9) "Petitioners do not explain how the district court erred . . ." The judgment which this Court is asked to review is the judgment of the court of appeals, not the district court. The Petition fully explains two fundamental errors of the court of appeals. It happens that the district court erred in these same two respects, as well as others, but that is not what this Petition addresses.

At page 11, note 8, and on page 5, respondents describe as an "alternative holding" the ruling of the court of appeals that a decision not to modify, suspend or revoke a Section 404 permit in the public interest, pursuant to 33 C.F.R. § 325.7, is not reviewable under the Administrative Procedure Act. This is not an alternative holding on the question

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[1] The brief in opposition is replete with mis-statements of fact. Because most of them have no direct relevance to the Questions Presented, correcting them would further divert attention from the question at hand.

whether the Corps complied with NEPA,[2] and is not relevant to the Questions Presented. Of course, petitioners dispute this holding, but have not chosen to present that question on this petition for certiorari.

Mindful of Rule 17, petitioners have presented two questions of broad, general applicability to judicial review of determinations of no significant impact. The question of the reviewability of the public interest determination made pursuant to that obscure Corps regulation lacks the broad, general importance of the two Questions Presented by petitioners.

1. The first Question Presented is whether a federal agency must articulate a "reasoned evaluation" of the factors relevant to its determination that its action will result in no significant environmental impact. The brief in opposition concedes (pp. 7, 10, 11) that indeed the agency must articulate such a reasoned evaluation. By way of opposition, respondents claim that the court of appeals did not rule to the contrary (p. 9), and also that the Corps furnished such an evaluation (pp. 8-9). Both claims are disingenuous.

One of the two principal bases of the decision below is the court's explicit ruling that the agency need not furnish a reasoned explanation of its Finding of No Significant Impact:

> The Coalition argues that . . . , because the MFR does not convey a "convincing statement of reasons

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[2] The complaint advanced a number of claims. Pet. App. 5a. Among them was the claim that the Corps failed to comply with NEPA and the NEPA-implementing regulations in making its Finding of No Significant Impact, a claim which underlies the Questions Presented here. Both courts below held this claim reviewable, and reviewed it. In addition, petitioners claimed that the Corps acted arbitrarily and capriciously in refusing to suspend, modify, or revoke the permit in the public interest, under 33 CFR § 325.7. That claim is the one which the court of appeals (erroneously in petitioners' view) held not subject to judicial review under the Administrative Procedure Act.

> why potential environmental effects are insignificant," the Corps' decision not to prepare an EIS must be found to be unreasonable. . .. These arguments are easily rejected. . . .
>
> . . . [T]he question before us is not, as the Coalition urges, whether the MFR contains the requisite convincing reasons to stand on its own, but whether, under the appropriate standard of review, the determinative finding in the MFR is sustainable on the administrative record made. *Camp v. Pitts*, . . .

Pet. App. 9a. If that explicit statement were insufficient, examination of the opinion below (Pet. App. 1a-17a) would confirm that ruling. At no point in those 17 pages did the court purport to point out any document which constituted a reasoned evaluation of any environmental factors, or acknowledge that any such evaluation was required. Instead, the court stated:

> [T]he court's only role is to insure that the agency has **considered** the environmental consequences . .. The sheer volume of the administrative record in this case is evidence that the Corps gave environmental effects the type of **consideration** required . . . The Corps **considered** . . . In all, the Corps **reviewed** . . . [T]he question is whether the Corps **"considered"** environmental effects . . . The record is replete with evidence that each of these issues was before the Corps. . . .

Pet. App. 13a-14a (emphasis added). Respondents demean the court of appeals in arguing (p. 9):

> We do not read the court's opinion as expressing that view [that the Corps need not furnish a reasoned explanation for its FONSI]. Rather, it appears that the court of appeals understood petitioners' claim to be that the Corps failed to consider relevant environmental factors.

The Summary of Argument at page 13 of petitioners' brief in the court of appeals reads as follows:

> 1. The proposal to build a stadium in the floodplain, premised upon the commitment of the Football Cardinals to sign a long-term lease, became moot when the Cardinals flew to Phoenix.
>
> 2. The role of the court is to determine whether the MFR supplies a convincing statement of reasons why the potential effects of the revised project are insignificant, **not to determine whether the Corps "considered" information**.
>
> 3. Judicial review is based on the whole record, including whatever detracts from the Corps' decision, not merely those portions which the Corps chooses to produce.
>
> 4. The MFR reveals that the Corps, rejecting the demands of FWS, EPA, MDNR and MDOC for an EIS, failed to acknowledge or assess a number of potentially significant environmental impacts.
>
> 5. The Corps may not escape the NEPA and other requirements of public notice and public involvement by issuing a notice and a permit for an industrial park, and thereafter, without public notice, permitting a non-industrial use which will have major environmental impacts.

(Emphasis added.) No judge of the Eighth Circuit could have "understood petitioners' claim to be that the Corps failed to consider relevant environmental factors."

It is ironic that the Corps now argues (pp. 10, 8-9) that the Corps "adequately explained the rationale for its decision" in the MFR, supplemented by the EA.[3] In the court of

[3] Respondents complain (p. 10) that "Petitioners have not explained why any further explanation was required . . ." On this petition for certiorari, the point is that the court of appeals has required no explanation at all. However, petitioners have illustrated some of the matters which need explaining at page 21 of the Petition.

appeals the Corps argued just the opposite: "The MFR is not, and is not intended to be, an environmental document. . . . The MFR is not the record that a court reviews to determine compliance by a federal agency. . ." (underlining in original). Brief for the federal appellees, pp. 20, 22. The Corps' reversal of its position comes too late to eradicate the Eighth Circuit's erroneous ruling. The court of appeals has already upheld the Corps' earlier argument that a reasoned explanation is not necessary.

At page 9, note 5, respondents argue that the earlier Eighth Circuit decisions do not really hold that an agency need not explain its decision not to prepare an EIS. These are the arguments presented by petitioners in the court below, and rejected by that court.

Stripped of its camouflage, the brief in opposition (p. 11) constitutes a simple confession of error on the first of the Questions Presented. But this confession of error will not be available to the Eighth Circuit, or the Eighth Circuit bar, in the future. It will not bring the Eighth Circuit into line with the other circuits. If experience in this case is any guide, it will not even restrain Department of Justice attorneys writing briefs in the Eighth Circuit in the future. The minimal relief to be granted is to vacate and remand the decision below, for reconsideration in the light of *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851 (May 1, 1989). *E.g., Egan v. City of Aurora*, 365 U.S. 514, 515 (1961); *Walton v. Arkansas*, 371 U.S. 28, 29 (1962). However, the deficiencies of the MFR being as plain as they are (see Petition, p. 21), judicial economy would be better served by outright reversal. Rule 23.1.

2. To vacate and remand, or to reverse outright, on the first Question Presented would not clarify the muddle created by the Eighth Circuit, unless this Court also grants certiorari on the second Question Presented. The Eighth Circuit adheres to its peculiar NEPA rule that the reviewing court will refuse to review a determination of no significant impact unless the plaintiff demonstrates facts "omitted

from the administrative record" which would show that the project could have a substantial impact on the environment. The court of appeals has ruled that these petitioners failed to demonstrate such facts, and are therefore barred. See Petition, pages 18-22. Respondents do not contend that they can present "any matter or ground why the [second Question] should not be reviewed by this Court." Rule 22. Respondents do not deny that the Eighth Circuit made this ruling, that this ruling is the authoritative affirmation of a consistent line of Eighth Circuit decisions, that the Eighth Circuit rule is rationally indefensible, or that the rule is a rule of fundamental importance, drastically curtailing judicial review of NEPA cases in the Eighth Circuit. The Solicitor General simply ignores this Question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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